THE HAGUE RULES 1921 EXPLAINED

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PREFACE

In view of the wide interest taken by commercial and shipping men and bankers in the proposals to simplify and standardise on an international basis the risks to be assumed by sea carriers under a bill of lading, it is thought that an explanatory summary of the scheme with a short account of the events which led to the preparation of the Hague Rules, 1921, defining the risks referred to, may be of interest. The introductory part of this small book gives the history of the Hague Rules, which are the work of the Maritime Law Committee of the International Law Association, with a condensed explanatory statement of their contents. Following the text of the Rules are some notes dealing with special points, including the question of "Received for Shipment" bills of lading.

S. D. C.

October, 1921.

NOTE TO SECOND EDITION

As a considerable demand for copies of this explanation of the Hague Rules continues, the book has been revised and enlarged. Since it was first published discussion of the proposed new code of conditions has proceeded actively, not only in the United Kingdom and British Dominions, but also in European countries, in America and in Japan. The Introduction has, therefore, been extended so as to include reference to more recent events foreshadowing the adoption of the Rules in actual business soon after the beginning of February, which was the time proposed. It appears probable that they will, to an increasing extent, be incorporated in bills of lading, especially those issued on shipment of goods by liners. The detailed notes have been much expanded, and all the principal points arising have been dealt with. The French text of the Rules and the text of the American and Canadian Acts have been added in Appendices. Most of the bills of lading in use throughout the world are in English, and comparative references in the notes are mainly to English and American law, but it has been kept in view throughout that the Hague Rules were drawn up as a self-contained international code independent of national laws and capable of use anywhere.

S. D. C.

January, 1922

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TABLE OF CASES

(*References to reports are given on pages where cases are cited.*)

LIST OF PRINCIPAL WORKS OF REFERENCE

"The Contract of Affreightment as expressed in Charter-parties and Bills of Lading." By Sir Thomas Edward Scrutton. Tenth Edition by Sir T. E. Scrutton and F. D. Mackinnon. London: Sweet and Maxwell, Ltd. 1921.

The Law relating to the Carriage of Goods by Sea." By the late T. G. Carver. Sixth Edition by James S. Henderson. London: Stevens and Sons, Ltd. 1918.

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"The Law of Bills of Lading." By Eugene Leggett. Second Edition. London: Stevens and Sons, Ltd. 1893.

"The Law relating to Merchant Ships and Seamen." By Charles Lord Tenterden. (Commonly known as "Abbott on Shipping.") Fourteenth Edition by the late J. P. Aspinall, Butler Aspinall, and H. S. Moore. London: Shaw and Sons; Butterworth and Co. 1901.

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"How the Hague Rules affect Merchants." By A. E. Jackson. London: Effingham Wilson. 1921.

INTRODUCTION

I. General Scheme of the Rules.

The Hague Rules, 1921, defining the risks to be assumed by sea carriers under a bill of lading, were framed by the Maritime Law Committee of the International Law Association. After consultation with representatives of the interests concerned from numerous maritime States the Rules were settled during a conference of the Association at the Hague in September, 1921. The conference approved the Rules, and recommended them for international adoption.

Shipowners, shippers, consignees, bankers and underwriters, as well as lawyers, collaborated in the drafting, discussion and settlement of the Hague Rules. Indeed, the Rules are the outcome of a series of developments in which all those interests have been concerned. "There can be no doubt," observed *Lloyd's List* in recording the adoption of the Rules, "that, of late, the sense of dissatisfaction among shippers with the existing state of things has become more marked, and shipowners, while reluctant to abandon their position of freedom to agree terms of contract with individual merchants, have recognised that, as a matter of business, they should meet, as far as possible, the wishes of their customers. The allegation has been that, so far as miscellaneous traffic

carried on liners is concerned, freedom of contract is non-existent or illusory, and that shippers have no option but to accept the conditions, exempting sea carriers from responsibility for loss or damage, prescribed by the forms of bills of lading issued by shipowners. Shippers pressed for the imposition on shipowners of a compulsory obligation to be responsible for the safe carriage of the goods. The demand, though insistent, lacked precision. The intervention of the Maritime Law Committee gave an opportunity for the respective parties to the dispute to become acquainted with the views of the other side. Discussion evolved a clear issue, and it did more. It enabled the parties not only to understand their differences, but, it would seem, to settle them. The Rules provide a definite basis for individual contracts, which has been arrived at, not by compulsion from outside, but by agreement among those directly concerned. Shipowners, cargo owners, bankers and underwriters, representing not one but many nationalities, have met together, and, as a result of their agreement, are now pledged to each other in honour to try and give effect to the scheme which has been worked out."

The general idea, then, of the Hague Rules is to simplify and standardise, in a form suitable for international use, some of the conditions which have hitherto appeared in small print in bills of lading: in other words, to substitute for part of that small print a statement of terms which are fair terms between the parties to the contract of carriage, and can be incorporated in all ordinary bills of lading by a condition simply declaring that "The Hague Rules, 1921" shall apply.

Experience has shown that it is not practicable to draw up a complete uniform bill of lading for all trades—the varieties of circumstances for which provision must be made are too great—but there is no reason why certain features more or less common to all bills of lading should not be standardised. The Hague Rules deal in that way with the responsibilities and liabilities of sea carriers. While they will not supersede all the various conditions commonly appearing in small print, they will take the place of a substantial part of the small print, and, moreover, of a part which has long been matter of controversy between shippers of goods and shipowners.

This, broadly stated, is the scheme of the Rules; but to make their purpose and effect clear we must trace briefly the events in the course of which bills of lading have gradually assumed their present form. A short excursion into commercial history is necessary. Those who are familiar with the story can skip what immediately follows, but it is essential to a full and proper understanding of the matter to recall in outline the origin of the conditions contained in modern bills of lading.

2. Origin of Bill of Lading Conditions.

Originally bills of lading did not contain any conditions at all. These documents came gradually into use as the early custom of merchants or their agents to travel on board the ship with the goods ceased to be followed. When that was the practice particulars of the goods were merely entered in a register carried by the ship, but when

no one accompanied the goods, the necessity arose for a separate document. Therefore bills of lading were introduced. They were issued by the shipowner to the shipper of goods, and were forwarded to the consignee—the person to whom the goods were to be delivered—to be produced by him as evidence of his right to take delivery. The bill of lading was a receipt for the goods issued from the ship, and also a document for transferring the title to the goods to the consignee. To fulfil these purposes more than one copy of the bill was required, and the custom therefore grew up of issuing it in duplicate or triplicate. Moreover, the consignee might resell what he had bought before it arrived, and so the practice of transferring the property in the goods by indorsing the bill of lading became established. Apparently bills of lading were in use before the sixteenth century, and by the eighteenth their indorsement and use as transferable instruments was well established (Bennett's "History of the Bill of Lading").

In course of time bills of lading came to be worded so as to state the terms of the contract of carriage, and accordingly the present-day bill of lading is defined in Scrutton on Charter-parties and Bills of Lading as "a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship." The bill of lading, though not the contract, is, as the same learned work points out, evidence of the terms of the contract. When indorsed it is the only evidence.

§ Enlargement of the Clauses.

The introduction of the conditions of shipment into bills of lading was a gradual process. What exactly was the liability of the shipowner in the absence of express stipulations in early days is an historical inquiry which we need not pursue here. Whatever it was, steps were taken to qualify it by the insertion of the words "the dangers of the seas excepted" (old form of bill of lading, Abbott, 472). No further exception was introduced till after 1795, when shipowners were alarmed by a legal decision as to the extent of their liability. Failing in an attempt which was made to obtain legislation limiting their liability, shipowners altered the form of the bill of lading by introducing the more comprehensive exception of dangers and accidents of the seas now commonly in use (Abbott, 578; Maclachlan, 605). The number of exceptions has since grown greatly. To meet risks disclosed from time to time by judicial decisions new exceptions have been inserted to protect shipowners from liability.

"It is," observed Mr. H. R. Miller at the Paris conference of the International Law Association in 1912, "because of those decisions that those most extraordinary and most elaborate clauses of exoneration, not only with regard to the liability of the shipowner, but also with regard to deviations, have been inserted. And at first blush, when one reads one of those bills of lading and sees all these extraordinary exceptions, naturally one is up in arms, and says: 'What on earth does it all mean? Is the shipowner going to carry my cargo and have no

liability whatever?' I can assure you, from the shipowner's point of view, that that never was his intention, nor does it, in fact, take place in practice."

Some of the reasons why the clauses were multiplied were very clearly stated at the Hague conference of the International Law Association, 1921, by Sir Norman Hill, who, after referring to the adoption, a good many years ago, of a clause whereby the shipowner freed himself from liability for negligent navigation, pointed out that the shipowner was not content to stop there. "As his business operations widened out" (continued Sir Norman), "he endeavoured, in the bargains he made, to protect himself against liability for the negligence of those employed in the handling, stowage, and care of the cargo. The work had to be done in small part by the crew, who were his servants, but the great bulk of the work had to be entrusted to independent contractors. The loading, stowage, and discharging had to be placed in the hands of independent stevedores, and in many cases the owners of the cargo bargained for the right to name the stevedore to be employed. In other cases the loading or discharging was taken over by the Port Authority or some other undertaking which provided the piers, elevators, or tips at which the cargoes were handled. And as more and more mechanical appliances were employed, checking by the ship's officers of the weights or numbers of the commodities dealt with became more and more difficult.

"And these responsibilities and difficulties increased as the ships grew in size and as their cargoes became more and more varied. Instead of a full cargo shipped by one

merchant and weighed at the ship's rail, a liner was asked to carry thousands and tens of thousands of separate packets shipped by and consigned to hundreds of different interests.

"There were other factors operating to broaden out the scope of the shipowner's operations. As sea transport improved in regularity, safety and certainty, trade sought to turn the shipowners' organisations to the best possible account, and those organisations lent themselves readily not only to the carrying but also to the collection and distribution—and the retail distribution—of the cargoes. Accordingly the bill of lading was extended to cover not only goods actually laden on the ship, but goods handed over to the line to be shipped in the ordinary course of its business, and goods left on the quays after discharge to be distributed amongst purchasers and sub-purchasers. And it went further than this, for it was made to cover through carriage by land and sea, until the ship became only one of the links in the transport services employed. In all these developments the bill of lading became more and more the document of title upon which trade financed its operations, and the shipowners are, I think, entitled to point with pride to the confidence with which their engagements, as expressed in the bills of lading, have been accepted by the bankers. It was all sound and healthy development of business enterprise, well calculated to cheapen transport and distribution, but it was accompanied by risks. It necessitated the shipowner acting as a shipping agent, as a wharfinger, and even as a warehousekeeper, and as a distributing and forwarding agent, and in all of these

capacities he had to entrust the greater part of the work to independent contractors. . . .

"These developments in the oversea trade" (Sir Norman Hill pointed out), "could have been provided for in either of two ways:

> "First. The shipowner could make himself responsible to carry and to deliver the goods in safety, answering for all loss or damage which might happen to them while they were in his possession, or
>
> "Second. The shipowner could offer his services to the merchant on the understanding that he (the shipowner) would use all due diligence in carrying and delivering the goods, but would assume no financial responsibility if the goods were lost or damaged.

"If the shipowner had accepted the first of these positions he would have had to base his freights in part on the value of the goods carried, as the insurance he gave would be part of the working expenses of his business.

"By adopting the second course the shipowner could continue to fix his freights with regard to the weight or bulk of the goods carried and without reference to their value, leaving the merchant free to insure himself against loss, or to run that risk uninsured as he pleased.

"The second course was" (Sir Norman Hill added) "the one adopted, and by strengthening the negligence clauses the shipowner has aimed at relieving himself from all financial responsibility resulting from loss or damage sustained during the carriage."

4. Cargo Interests' Complaints.

It is apparent from the outline which has been traced thus far that bills of lading are the foundation of overseas trade. By reference to these documents the responsibilities and rights of both shipowners and shippers are determined. On the basis of bills of lading are established, through bankers, the credits necessary for the financing of mercantile contracts. According to the terms of bills of lading, the risks of carriage (including risk of loss by pilferage) are shared between the immediate parties, and by them for the most part insured with underwriters. Everyone interested at all in commerce overseas is therefore deeply concerned in bills of lading and in the terms they contain, or should contain, and any question regarding those terms is not merely one of form but of substance.

There is an apparent, though not a real, divergence between the interests of senders and receivers of goods as to the terms of bills of lading. The rate of freight charged by the carrier must depend in part on whether, under the bill of lading, the goods are carried at owners' or at carriers' risk. As the sender of goods is interested in obtaining a low freight, he will usually be inclined to accept owners' risk conditions. The person who is to receive the goods, on the other hand, is more interested in their safe arrival in good condition, and therefore will be inclined to favour carriers' risk conditions in the bill of lading. Higher freights must be reflected, more or less, in higher prices, and so both sender and receiver of goods have really the same interest in a contract being

made for safe carriage at the lowest possible market rate of freight. The sender of the goods, however, actually makes the contract with the carrier. His primary interest in securing a low freight is apt to govern his action. Accordingly he does not concern himself closely with the conditions, and so shipowners gradually tightened their negligence clauses as we have seen.

The complaints of the cargo interests against this policy were thus summed up in a recent statement by Mr. Charles S. Haight, Chairman of the Bill of Lading Committee of the International Chamber of Commerce:

> 1. That carriers have unfairly exempted themselves from practically all liability for the faults of their servants in the stowage, custody and delivery of cargo by negligence clauses, or, where such clauses are prohibited by law, have limited their liability to a wholly inadequate figure—$100 or less per package.
>
> 2. That carriers have unfairly evaded the payment of just claims by bill of lading stipulations requiring claims to be presented within an impossibly short period.
>
> 3. That carriers have evaded the payment of claims for pilferage and similar losses, and have even encouraged such losses by casting an impossible burden of proof upon cargo owners.
>
> 4. That carriers have improperly stipulated in their bills of lading for the benefit of insurance effected by the shippers.

How these complaints have been met by the Hague

Rules will be seen later (see p. 31). They have been partially met by legislation, but the restrictions on the insertion of negligence clauses in bills of lading instituted in various countries are lacking in uniformity, and in other respects also are defective.

5. Countries allowing Freedom of Contract.

The state of affairs resulting from the policy pursued by British shipowners was summarised in the report dated February, 1921, of the Imperial Shipping Committee (a document more particularly referred to later on), as follows: "By the Common Law of England the shipowner is responsible for the safe carriage and delivery of goods committed to his charge as a common carrier, unless prevented by certain definite causes such as the Act of God or the King's enemies; but there is nothing in English law to stop him from contracting out of the whole or any part of his liability, and, by a practice which has gradually extended since about 1880, British shipowners do habitually in their bills of lading contract themselves out of their Common Law liability to a large extent."

The Committee added in their report that, "although shipowners protect themselves in their bills of lading from legal liability, yet the practice among many of them is, in fact, to pay reasonable claims for loss or damage to goods. Such practice is not, however, universal."

In France, Sweden, and Norway the legal position has, it appears, hitherto been very much as in the United Kingdom.

In Germany the largest shipping companies, as the outcome of agreement between them and shippers, adopted before the war a bill of lading which accepted on behalf of the shipowners the carriers' risks.

6. Countries prohibiting Exemption Clauses.

In America freedom of contract as between the parties to a contract for the carriage of goods by sea was narrowed by judicial decisions, and, since the passing of the Act of Congress, commonly known as the Harter Act,* in 1893, the insertion by shipowners of clauses exempting them from liability has been prohibited by statute.

The Harter Act, while exempting a shipowner who exercises due diligence to make his ship seaworthy from liability for damage or loss resulting from what may be shortly described as navigation risks, prohibits him from inserting in any bill of lading or shipping document any clause relieving him from liability for what may be termed carriers' risks—that is, from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise. The Act applies to ships transporting merchandise from or between ports of the United States and ports in other countries, and, consequently, its provisions must be incorporated in all bills of lading issued in the United States by a clause declaring the shipment subject to the provisions of the Act. It thus necessarily

* As to the purposes and interpretation of the Act see the "Commercial Laws of the World," vol. vii., p. 494.

becomes part of the contract which any shipowner, of whatever nationality, may make for the carriage of goods from United States ports.

In Australia, New Zealand, and Canada, Acts have been passed resembling the Harter Act in their general features. The most recent of these is the Canadian Water Carriage of Goods Act, 1910, amended by a further Act in 1911.

The Australian Sea Carriage of Goods Act was passed in 1904, and the New Zealand Shipping and Seamen Act in 1908, an amending statute being passed in 1911. Except that the New Zealand legislation is so worded that it apparently applies only to cases brought before the New Zealand courts, the Australian, New Zealand, and Canadian Acts closely resemble each other.

In Japan, the Commercial Code provides that "the shipowner cannot even by an express agreement be exempted from liability for damage caused by his own fault, or by the bad faith or the gross fault of a mariner or of any other person employed, or by the unseaworthiness of the ship" (Report of Imperial Shipping Committee).

7. Imperial Shipping Committee's Report.

A comparative view thus shows a difference between the laws of the various countries which fall into two contrasting groups. Generally speaking, the law merchant is in its principal outlines uniform in all countries, having for the most part developed from common inter-

national mercantile usage. Here, however, is a marked divergence, which has been the subject of much discussion. It is common knowledge that in many countries commercial bodies representative of shippers of goods have agitated for legislation on the question of the limitation of shipowners' liability by clauses in bills of lading whereby the insertion of such stipulations would be uniformly prohibited. British Chambers of Commerce have been active in the matter, and proposals for legislation have been brought forward in France, Holland, the Scandinavian countries and elsewhere.

The matter, so far as affecting the British Empire, was inquired into by the Dominions Royal Commission, which, in 1917, made recommendations, but no action followed. The position was reviewed by the Imperial Shipping Committee appointed in June, 1920, to whose report, dated February, 1921, several references have already been made. The recommendations of the Committee were summarised and commented on in a leading article in *Lloyd's List*, from which we quote. "This Committee" (observed the article), "composed of representatives of British State Departments, Dominion Governments, and shipping and commercial interests, has recommended that there should be uniform legislation throughout the Empire prohibiting shipowners from contracting out of carriers' risks (as distinguished from navigation risks) by clauses in bills of lading. The Committee's conclusion includes proposals for certain further provisions in regard to particular points connected with the extent of shipowners' liability which are important in themselves, but, in comparison with the main question,

are merely details. The outstanding fact is that the Committee, representing very diverse points of view, is agreed that a Canadian statute dealing with the water carriage of goods, and closely resembling the well-known American Harter Act, should be taken as the model for legislation to be passed in such a form that its application will extend to the whole of the British Commonwealth of Nations. The Committee feels that on commercial grounds there is probably an advantage to be gained by the proposed change. It is suggested that, though the English law would be fundamentally altered, the change would not, in practice, greatly affect the position of shipowners who while inserting clauses excluding liability, nevertheless pay reasonable claims. Uniformity of law would be a gain, and the discontent which shippers frequently express in regard to shipping conditions would, it is suggested, be removed. The Committee's report touches on points which have, from time to time, been matters of acute discussion between shippers and shipowners, and have a bearing also upon the interests of underwriters. It may be that if steps are taken to give effect to the proposals they will not pass unchallenged. Still, here is the outline of a broad policy, intended to reconcile interests and, as far as possible, eliminate conflicts. It is entitled, at the very least, to careful consideration as a serious effort, based on well-balanced arguments, towards a satisfactory settlement of an old and difficult problem. In various continental countries there is, the report mentions, a considerable body of opinion in favour of legislation along the lines proposed. In view of this fact it may be asked whether the steps to be taken might

not be even wider in their scope than the Committee proposes."

After pointing out that the terms of reference limited the proposals of the Imperial Shipping Committee to the British Empire, the article quoted from asked, "Why should not the rules as to shipowners' liability be of world-wide application?" and proceeded: "The Maritime Law Committee of the International Law Association is at present examining the whole law of affreightment, which includes, or should include, provisions as to the form of bills of lading. Co-operation on the widest possible basis would seem to be desirable if the matter is to be dealt with satisfactorily."

This suggestion that the Maritime Law Committee should deal with the question anticipated the action which in fact followed; but, before referring to that, mention should be made of a circumstance which has made the whole question of responsibility for goods in transit a more urgent problem than formerly, and has had a great deal to do with the amount of attention devoted to the legal aspect of it.

8. Pilferage.

One of the greatest difficulties which since the war have troubled business men has been how to check the enormous increase in theft and pilferage from goods in transit. Shipowners estimate that the evil is twenty times as great as before the war. Shipping companies have had to pay immense sums to meet claims for lost

goods. Underwriters have (as mentioned in the report of the Imperial Shipping Committee) refused to cover more than seventy-five per cent. of the losses due to pilferage, with the object of making shippers more careful in packing, and shipowners more diligent in supervising their servants. The root of the evil is widespread individual dishonesty, and this increase in dishonesty is one of the bad results of the war. Whatever moralists may say, commercial men in all countries have had to consider the consequences seriously, and endeavour to find practical remedies Circumstances have thus forced upon their attention the question of the clauses in bills of lading limiting shipowners' liability, and, on taking up the matter, the Maritime Law Committee found that it was a problem in which business men of all nationalities were keenly interested. Thus progress with the scheme for an international settlement of the long-standing difference between shippers and shipowners has been rapid.

9. The Maritime Law Committee.

At the time when the Report of the Imperial Shipping Committee was published the Maritime Law Committee of the International Law Association had already under consideration the draft of an international code on the law of affreightment dealing mainly with charter parties and only incidentally with bills of lading. When, however, the Maritime Law Committee met in conference, under the presidency of Sir Henry Duke, at Gray's Inn,

on May 17th to 20th, 1921, to consider this and other subjects, it appeared desirable that attention should be devoted mainly to those aspects of bills of lading which were dealt with in the Report of the Imperial Shipping Committee. The subject of charter parties was therefore postponed, and the Maritime Law Committee proceeded to consider the conditions under which goods are carried by sea under bills of lading, bearing in mind that a lawfully issued bill of lading binds a ship whether issued on behalf of the owner or the charterer.

At this conference it was urged on behalf of shipowners that the permanent interests of both parties to the contract and of the whole community are best served by maintenance of the mutual right to make their bargains without legislative interference, but it was stated that shipowners were desirous of rendering all the services which owners of cargo in fact require, and a plain statement was invited of the matters in respect of which compulsory regulations were called for.

Shippers were stated to be in general agreement with the proposals set forth in the Report of the Imperial Shipping Committee. They advocated the adoption of international regulations whereby shipowners should be answerable in all cases for loss and damage due to unseaworthiness of the ship, inclusive of any harmful or improper condition of the ship's hold, and for default in lading, custody, and care, and unlading of goods; and should be exempt from liability in respect of perils of the sea and of navigation (including perils due to negligent navigation, act of God, and the King's enemies), insufficient packing and seizure under legal process. Bills of

lading drawn in conformity with the Water Carriage of Goods Act, 1910, of the Dominion of Canada, would, it was stated, provide all necessary safeguards to cargo owners.

The views of the majority of the Committee (according to the report officially issued) were expressed in favour of a uniform system of law among maritime States whereby liability for losses caused by defect of ship or default in the handling and custody of goods should be obligatory upon the shipowner, provided that—in the words of Section 6 of the Canadian statute—"if the owner . . . exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship or from latent defect."

The Committee, after discussing the whole matter in detail, came to the conclusion that it would be simple to incorporate in a common form bill of lading by words of reference the terms of an international code in the same way as the terms of individual statutes or of agreed rules have already been incorporated.

In order to be in a situation to deal with this matter at the full Conference of the Association to be held at the Hague in September, 1921, the Committee decided to take steps to obtain the embodiment in a draft code of regulations of such provisions as would in their view give international effect to the main intentions of the Harter Act and the Dominion statutes.

10. The Hague Conference.

The code of Rules afterwards adopted under the name of "The Hague Rules, 1921," was drafted by a sub-committee and circulated among those concerned for criticism. Much valuable work was done in adjusting the clauses to meet the expressions of opinion received, and eventually the proposals were discussed at length and finally settled at the Hague. At that conference of the International Law Association all the interests concerned were represented by delegates of many nationalities, and a series of resolutions was adopted as follows:

Resolutions as recommended by the Maritime Law Committee and passed unanimously by the International Law Association in their meeting at the Hague on the 3rd day of September, 1921.

1. That in the opinion of this Association international overseas trade and commerce will be promoted and disputes avoided, or the settlement thereof facilitated, if the rights and liabilities of cargo owners and shipowners respectively are defined at an early date by Rules of a fair and equitable character with regard to bills of lading which shall be of general application.

2. That the Association approves, under the name of "The Hague Rules, 1921," the Rules as to carriage by sea framed by its Maritime Law Committee which have been settled during this conference after consultation with representatives of the interests con-

cerned from numerous maritime States, and recommends the same for international adoption. For the purpose of securing prompt and effective action the Association relies upon the continuance of the co-operation among shipowners, shippers, consignees, bankers and underwriters present and represented at the conference which appears to render this proposal at the present time a practical means of progress.

3. That in the opinion of the International Law Association these Rules should apply to ships owned or chartered by any Government other than ships exclusively employed in naval or military service.

4. That these Rules be published in English and French, the official languages of this conference.*

5. That in the opinion of this Association the use of the shipping documents known as "received for shipment" bills of lading and like documents has become in many cases a necessity of commerce. This Association is therefore of opinion that the interests concerned should co-operate to remove difficulties which at present attend the use of such documents in the cases in which the necessity for their use is generally recognised.

6. Whereas special legislation on the subject dealt with by these Rules exists in various States and is proposed in other States, and whereas it will only be possible in such States to bring these Rules into

* The French text of the Rules is given in Appendix I.

operation if they be in accord with national legislation, it is in the opinion of this Association desirable in order to secure uniformity that such legislation or proposed legislation shall be brought into harmony with these Rules.

7. That the Executive of the Maritime Law Committee be and is hereby authorised and requested to continue its action, in conjunction with the representative bodies and interests concerned, in order to secure the adoption of the said Rules so as to make the same effective in relation to all transactions originating after January 31st, 1922.

In connection with these resolutions it should be noted, before passing on to summarise the Rules themselves, that the possible method of uniform legislation in each country was definitely put aside in favour of the alternative of an international code of rules worked out after full discussion and representing terms of agreement as to sea carriers' risks between all parties. In taking this course the members of the International Law Association were following precedent. The York-Antwerp Rules of General Average, which were the outcome of earlier conferences of the Association, are already commonly incorporated by reference in bills of lading, and the intention is that the Hague Rules should similarly form part of the terms of all ordinary contracts for the carriage of goods by sea expressed in bills of lading. If, as appears probable, the Rules thus come to form part of the everyday machinery of business, the steps taken in arriving at agreement may rightly be described, in the words of Sir

Henry Duke, as "more involved in the future of the world than schemes of greater ambition that are being discussed."

II. Explanatory Summary of the Rules.

As already remarked, a shipowner has, by English law, the liabilities of a common carrier. In the absence of express stipulations a shipowner carries goods absolutely at his risk. In modern practice there always are express stipulations, and, under an ordinary bill of lading, the contract is "(1) to carry absolutely at shipowner's risk; (2) unless the damage is caused by excepted perils; (3) provided the shipowner and his agents have used reasonable care to prevent such damage" (Scrutton, 228).

The Harter Act and the similar legislation already referred to restrict freedom of contract upon the assumption that there exists, apart from the legislation, a basis of liability.

The Hague Rules, while intended to give effect to the main provisions of this legislation, do not assume or depend upon the pre-existence of liabilities. The Rules themselves set out the responsibilities and liabilities to which a sea carrier is to be subject, and the rights and immunities to which he is to be entitled. In view of their intended international application it is important that they do not assume a basis of liability which may be different under different national laws. The Rules are self-contained and complete in themselves.

The Hague Rules define the risks to be assumed by sea carriers under a bill of lading in a series of Articles, the

first of which, containing definitions, need not detain us here, except to note that "goods" does not include live animals and cargo carried on deck.

It should also be noted at the commencement that the scope of the Rules does not by any means extend to all the various matters dealt with by conditions in bills of lading. The Rules are concerned with sea carriers' risks only, and do not interfere with freedom of contract as to liability for loss or damage in connection with the custody or handling of goods prior to loading on or subsequent to unloading from the ship (Article VI.). "Carriage of goods" covers the period from the time when the goods are received on the ship's tackle to the time when they are unloaded from the ship's tackle.

Risks.—Article II. provides that (subject to the right given by Article V. to make a special agreement in relation to any particular goods, as explained later) under every bill of lading or similar document relating to the carriage of goods by sea, the carrier, in regard to the handling, loading, stowage, carriage, custody, care, and unloading of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities set forth in the Rules.

Responsibilities and Liabilities are dealt with in Article III. The carrier, it is provided, is bound to exercise due diligence to make the ship seaworthy, properly man, equip, and supply the ship, and make the holds and other parts of the ship in which goods are carried fit for them.

By Clause 2 of this Article "The carrier shall be bound to provide for the proper and careful handling, loading,

stowage, carriage, custody, care, and unloading of the goods carried." This, it will be noticed, throws the responsibility for the goods absolutely on the carrier, subject to the provisions of Article IV. below.

After receiving the goods, the carrier is required by the Rules to issue on demand a bill of lading showing (*a*) leading identification marks; (*b*) the number, quantity or weight of packages; and (*c*) the apparent order and condition of the goods. Except as to bulk cargoes and timber the bill of lading is made *primâ facie* evidence of the receipt by the carrier of the goods as therein described, and the shipper is held responsible for the accuracy of the particulars furnished by him.

Removal of the goods at the port of discharge is declared to be *primâ facie* evidence of delivery of the goods as described in the bill of lading unless written notice of a claim for loss or damage is given before removal. This, it should be observed, deals only with the question of evidence, and does not mean that if goods are removed without notice of claim, no claim can afterwards, in any circumstances, be made. It merely establishes a presumption of due delivery, which may be disposed of by sufficient evidence. Only if no action is brought within twelve months after delivery do the Rules declare the carrier discharged from liability Hitherto many bills of lading have entirely barred claims in default of notice within a few hours or days.

As to the form of bill of lading to be issued, it is laid down that, after the goods are loaded, this shall, if required, be a "shipped" bill of lading. A "received for shipment" bill of lading, if previously issued, may be

exchanged, when the goods have been loaded, for a "shipped" bill of lading, or may be converted into a "shipped" bill by being noted with the name of the ship and the date of shipment

The Rules themselves do not contain any other provision dealing with "received for shipment" bills of lading, though the difficulties which arise from the use of this form of shipping document were very fully gone into in the course of debate at the Hague conference. A resolution (which is No. 5 among those set out above) was adopted regarding "received for shipment" bills of lading. The whole matter is dealt with in a note later on. (See p. 69.)

Finally, Article III. provides that any clause or agreement relieving the carrier from liability for the obligations under which he is placed by the Article, or lessening such liability otherwise than as provided in the Rules, shall be null and void and of no effect.

Rights and Immunities are the subject of Article IV., the first clause of which gives exemption from liability for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied.

The next clause gives exemption from liability for loss or damage arising or resulting from negligent navigation, perils of the sea, and a number of other causes specified under seventeen heads, similar in general to the excepted perils in the ordinary bill of lading.

The excepted perils have, however, as Scrutton observes, varied with each trade and each shipowner.

Exceptions, the same author remarks, "are so numerous that an exhaustive enumeration is impossible"; but he gives a list of about fifty different exceptions which have come before the courts for judicial interpretation.

The position, if the Hague Rules are incorporated in a bill of lading, will be that the fixed list of exceptions contained in the Rules (which leave the shipowner's liability for ordinary carriers' risks intact) will govern the contract, and cannot be added to. The concluding clause of Article III. (noted above) renders of no effect any clause lessening the carrier's liability otherwise than as provided in the Rules.

It will be open to the parties, as already mentioned, to make a special agreement under Article V., but this must, by the provisions of that Article, be a non-negotiable document marked as such. It cannot be a bill of lading *if the bill is made subject to the Hague Rules*, but the bill of lading may, of course, be issued in the ordinary form without incorporating the Rules at all.

Apart from the fact that the gradual strengthening of clauses against cargo owners of which they have complained will cease if they adhere to the practice of contracting on the basis of the Rules, the circumstance that exceptions will be standardised will be a convenience especially to bankers, who have to handle large numbers of bills of lading every day for security purposes. As was pointed out at the Hague conference by Mr. W. W. Paine, representing the British Bankers' Association, it is not at present safe to pass a bill of lading without reading it through from beginning to end, for it is often the case that most material clauses and exceptions may

be hidden away among a number of innocent-looking clauses. In future, if a bill of lading incorporates the Hague Rules, that fact in itself will make it unnecessary to look for or be on guard against anything further so far as sea carriers' risks are concerned.

As to deviation, this Article, by its third clause, permits any deviation with the object of saving life, or any deviation authorised by the contract of carriage, and provides that the carrier shall not be liable for loss or damage resulting from such deviation.

It is implied in any contract of sea carriage that there shall be no unnecessary deviation. Deviation to save life is regarded as allowable; but, in the absence of special stipulation, deviation with the object of saving property is not. A clause permitting deviation is commonly inserted in bills of lading.

It will be seen that the Rules do not introduce any innovation in this respect. Deviation with the object of saving life is permitted in any case, and the bill of lading may contain a clause allowing deviation for such other purposes as may be specified. Then, if loss or damage results from a permitted deviation the carrier will not be liable.

The maximum amount of liability, dealt with in the fourth clause of this Article, was a matter which was the subject of lengthy debate. Various proposals were discussed before the limit of £100 per package or unit was agreed to. The clause referred to lays down that there shall be no liability beyond this amount (or the equivalent in other currency) unless the nature and value of the goods have been declared and inserted in the bill of lading.

It also lays down—and this is of great importance—that a higher, but not a lower, figure may be substituted by agreement.

It is not necessary here to refer to alternative proposals which were not adopted, but it may be pointed out that, under the Hague Rules, a loophole existing in the Harter Act and similar legislation (with the exception probably of the Canadian Act) will be closed The Rules in effect embody a suggested amendment of the Harter Act which has been the subject of discussion in American shipping circles. The object of this amendment would be to negative decisions of the American courts that, notwithstanding the provision in the Harter Act declaring it illegal for shipowners to contract out of liability, it is nevertheless lawful for the parties to agree upon a value for the goods, by which means shipowners effectively limit their liability for losses to cargo. Under the Hague Rules a reduced figure cannot be agreed, as the amount named as a maximum (subject to increase by agreement) is declared also to be a minimum. (See also note, p. 82.)

The remaining clauses of this Article do not call for special comment. There are provisions as to dangerous goods not introducing anything new, and a clause giving the carrier liberty to surrender rights or immunities, provided such surrender is embodied in the bill of lading.* Although the carrier can diminish his immunities, he cannot, as already pointed out, increase them and thereby lessen his liabilities under the Rules.

* This will allow of the insertion of the clause, usual in the timber trade, making the bill of lading conclusive evidence of the quantity of cargo received by the ship. See further as to this in note on page 64.

Special Conditions provided for by Article V. have already been referred to. (See also note, p. 89.)

Application of the Rules.—The scope of the Rules, dealt with in Article VI., was explained at the commencement of this summary.

Limitation of Liability.—By Article VII. the provisions of the Rules are not to affect the rights and obligations of the carrier under the convention relating to the limitation of the liability of owners of sea-going vessels. This refers to a proposed international convention for unifying different national laws on this matter, which, however, has not yet been finally settled.

To sum up: The Hague Rules hold the shipowner responsible for the goods from the time when they are loaded till they are unloaded, but free him from liability for loss or damage resulting from unseaworthiness if he has exercised due diligence to provide a seaworthy ship, properly manned, equipped, and supplied, and they free him from navigation risks. The Rules establish a standard form of terms of contract for the carriage of goods by sea, which has been settled after full discussion by all interests concerned, and is regarded by the great majority of those who have considered the matter as providing a fair and equitable basis as between the parties to the contract. The resulting certainty and uniformity will undoubtedly meet the convenience of bankers and underwriters. The proposal in the concluding resolution passed at the Hague by the conference of the International Law Association is that the Rules

should be adopted so as to make them effective in relation to all transactions originating after January 31st, 1922.

12. Cargo Interests.

Whether the Hague Rules fairly meet the long-standing complaints of the cargo interests is, of course, a business question on which opinions may differ. The Rules represent a compromise, and should therefore not be expected to satisfy fully every point of objection. They were evolved by discussion and to some extent by "give and take," and their strongest claim to approval is that they are an international basis arrived at by agreement in order to do away with a state of affairs productive of friction and irritation, which hinder business, and to promote certainty and international uniformity in shipping documents, which facilitate business.

So far as the main grounds of complaint by the cargo interests are concerned (taking the four heads of complaint set out on p. 10), it may be pointed out that the Rules—

1. Preclude the insertion of the negligence clauses objected to, and substitute for them provisions throwing responsibility for the safety of the goods on the carrier, the limit of whose liability is—in the absence of declared higher value—raised from a nominal figure to £100 per package or unit.

2. Allow a year for making claims for loss or damage, instead of declaring claims barred unless made within a

few hours or days, as has been the case under clauses commonly inserted in bills of lading.

3. Make the carrier responsible for pilferage and other risks and throw on him, instead of on the claimant, the burden of proof—that is, if the carrier does not deliver the goods as described he must give evidence exonerating himself from responsibility or pay the claim.

4 Give the carrier no right to the benefit of any insurance effected by the cargo owner.

The Hague Rules, as already indicated, are primarily intended for use in bills of lading relating to miscellaneous goods carried on liners, but they are so worded that they can be utilised in various trades, such as coal, timber and corn, where ordinarily goods are carried in larger quantities. If the Rules are incorporated in the shipping documents used in special trades, they require, of course, the addition of certain further clauses containing the special conditions customary in those trades. These points are dealt with in the detailed notes in the body of the book (see especially p. 64).

13. Shipowners.

Probably no better statement showing how the Hague Rules affect shipowners has been made than that addressed by Sir Norman Hill to the International Conference of Shipowners held in London in November, 1921. "They would agree," Sir Norman is reported to have said, "that if a code were to be of any value it must be because it facilitated commerce as a whole. All over-

sea commerce was carried on credit, and in procuring that credit the bill of lading played an important part. As shipowners it was to their interest to maintain the credit of bills of lading, and they had to realise that not only in commerce, but also in finance, they had become in themselves a commodity apart from the cargoes they represented. Commerce, finance and underwriting were international, and there were obvious advantages to be gained not only by the traders, but also by the shipowners, in making the bills of lading understood in those international markets. They became convinced that if restrictions were to be imposed on the shipowners it would be in the interests of all that those restrictions should be the same at all ports and in all trades.

"He was satisfied," Sir Norman Hill continued, "the Hague Rules were a substantial improvement on the Harter and Dominions Acts. He was satisfied that they were an improvement on any Act of Parliament that would have been prepared to carry into effect the Report of the Imperial Shipping Committee. He was satisfied on these points not merely in the interests of the shipowners themselves, but in the interests of international commerce as a whole.

"If you do adopt the Hague Rules," concluded the speaker, "it must be on the footing of your not only taking, but also giving the full benefit of each and all of those Rules. Charge as you are able for the services you render, but in return for the freights you receive give to the very utmost the services that the Rules impose on you. That is the basis on which the negotiations have proceeded from first to last with the cargo

interests, and I am convinced that it is only on that basis that not only traders and the shipowners, but also the producers and consumers in the world, will be able to reap the benefits that are to be derived from the settlement of a controversy which has lasted far too long."

14. Bankers and Underwriters.

Incidental reference has been made in the last section to the interest of bankers and underwriters in the matter. To these members of the mercantile community the uniformity resulting from the incorporation of the Rules in bills of lading is a manifest advantage which further legislative action would not ensure. The existing differences between national laws would almost certainly be multiplied by that method, and it is not surprising that bankers and underwriters have throughout strongly supported the proposals for international standardisation which have taken shape in the formulation of the Hague Rules.

15. Opposition.

Since the holding of the Conference at The Hague representatives of the commercial interests in whose shipping business the Rules are intended principally to be used have for the most part endorsed the proposals. Some opposition has manifested itself, but in the United Kingdom has originated and has been organised almost entirely by members of sectional trades interested in the carriage of bulk cargoes. In these trades certain special

clauses have usually been inserted in charter-parties and bills of lading. Doubts arose whether, in the revision of documents necessary on incorporating the Hague Rules, the customary bases of contracts might be disturbed. Unless the special clauses were continued along with the Rules, this would be so. The Rules having been worded in such a way as to allow of their being used in conjunction with the special clauses, the matter was, it might have been supposed, one for adjustment by conference between the interests directly concerned. This obvious course was not taken, or not taken until a late stage. Owing to this and other causes there developed, in place of the spirit of co-operation which was an agreeable feature of the proceedings at The Hague, an atmosphere of misunderstanding and suspicion.

The proposals were regarded in some quarters with the instinctive shrinking from innovation which, especially when reinforced by ignorance, is a formidable obstacle to the introduction of any change. The suggestion that ignorance has stood in the way of the adoption of the Hague Rules is not made in any offensive sense. In simple fact it has been so. "Merchants," said Mr. Justice Greer in the recent case of Ralli Bros. *v.* Walford Lines, Ltd. (December, 1921), 9 Lloyd's List Law Reports 418, "will not read or consider the documents which deal with their rights; bills of lading and all sorts of documents they never read at all." This difficulty, as the learned judge remarked, unfortunately arises in practice, and, when individual merchants came to examine the proposal to substitute certain new conditions for some of those which have been in use in bills

of lading, they were in many instances inquiring for the first time into the terms which it was proposed should be discarded in favour of the new code. Minds were confused, and, further, matters were frequently looked at from the standpoint of individual interests only. It was forgotten that the proposals, if they had any merit at all, were good as a whole and as a general compromise on many complex points. It was comparatively easy to single out particular points of objection and forget the broader question of the general convenience. Thus much confused discussion arose, but no serious defect in the proposed code was disclosed.

Some who favour sectional legislation rather than international action seem to be supporting a narrow and reactionary view. Some who question the effectiveness of voluntary agreement and fear that the absence of compulsion may impair the working value of the arrangement forget that the most strongly established rules of mercantile law are based on custom, and that, once a general practice is established, it will be followed. Business is based on trust and not on suspicion. The world-wide standardisation called for by the international character of modern business cannot readily be brought about by any other method than that which has been followed in the drafting of the Hague Rules.

16. Adoption.

The question of the adoption of the Rules is, however, one for business men to settle for themselves. These remarks are not inspired by any desire to press the claims

of the Hague Rules farther than sound reason can carry them. The limit of £100, up to which the carrier accepts liability, probably exceeds the value of the average package, and, if this is so, the matter resolves itself into the simple question whether it is desirable, in the general interest, that the carrier should be insurer also. If the carrier undertakes additional responsibilities the fact will, it may be assumed, ultimately have its effect on rates of freight. If it is good for business that this basis should commonly be adopted, the Hague Rules will probably come into more and more extended use.

The present indications are that, though no fixed date of adoption will be adhered to, the Rules will become the usual basis of contract in liner bills of lading. A number of liner companies have announced their intention of incorporating the Hague Rules in their shipping documents, and actual steps by way of revision of existing clauses with this purpose in view are being taken. Not only in the United Kingdom, but also in America and elsewhere, there appears to be a strong preponderance of opinion in favouring the adoption of the Rules. After a time they may, on the basis of experience, be adopted generally. The test of practice may show the need for amendment on some points, but that remains to be seen. In any event matters cannot proceed otherwise than step by step.

THE HAGUE RULES, 1921

DEFINING THE RISKS TO BE ASSUMED BY SEA CARRIERS UNDER A BILL OF LADING, REFERRED TO IN THE FOREGOING RESOLUTIONS. (*Set out on page* 20.)

Article I.—DEFINITIONS.

IN these Rules

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(*b*) "Contract of carriage" means a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea.

(*c*) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo carried on deck.

(*d*) "Ship" includes any vessel used for the carriage of goods by sea.

(*e*) "Carriage of goods" covers the period from the time when the goods are received on the ship's tackle to the time when they are unloaded from the ship's tackle.

Notes on Article I.

Carrier.

It has already been explained (Introduction, p. 4) that a bill of lading is a receipt for goods shipped on board a ship, stating the terms of the contract of carriage. A bill of lading may relate to a whole cargo, but is more often issued in respect of a parcel of goods forming part only of a cargo. The bill of lading may be issued on behalf of the shipowner, or on behalf of a charterer who has hired the ship from the owner under a charter-party. In the Rules the general term "carrier" is used to include the owner or the charterer who enters into a contract of carriage with a shipper.

Where a bill of lading is issued in respect of goods shipped on board a chartered ship, and the charterer is himself the shipper, the document is usually a mere receipt for the goods. Where the shipper is other than the charterer a bill of lading issued by or on behalf of the charterer may or may not incorporate some of the terms of the charter-party. It may, in some circumstances, establish contractual relations not only between the shipper and the charterer, but also between the shipper and the shipowner.

In Samuel *v.* West Hartlepool Co. (1906) 11 Com.

Cas., 115, Walton J. observed that, "Where the charter-party amounts to what is called a demise of the vessel, . . . the contracts with the shippers under the bill of lading are between them and the charterers and not between them and the owners. Again, there is another class of cases in which the charterers by the charter-party do no more than undertake that a full cargo shall be shipped and guarantee payment of a certain freight. In such cases . . . the contract of carriage under the bill of lading would ordinarily be between the owners and the shippers. . . . And between the two types or classes which I have described there is a great variety of intermediate cases."

As the term "carrier" is used in the Rules to include the owner or the charterer, the Rules will be applicable whether the contract is with the owner or the charterer.

Contract of Carriage.

"Contract of Carriage" is defined as meaning a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea. There is not in the Hague Rules or in any English statute any definition of a bill of lading. (The Customs Tariff Amendment Act, 1860, deals with the construction of the term "bill of lading" but does not define it.) Scrutton's definition has been quoted in the Introduction, p. 4. In the leading case of Mason *v.* Lickbarrow (1790), 1 H. Bl., 357, Lord Loughborough said: "A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a cer-

tain freight. The contract in legal language is a contract of bailment; 2 Lord Raym., 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board the shipmaster acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods."

It is pointed out by Scrutton (p. 178) that bills of lading making goods deliverable "to order" or "to order or assigns" are, by mercantile custom, negotiable instruments, the indorsement and delivery of which may affect the property in the goods shipped. "Negotiable" is not here used in the strict sense of an instrument giving to a transferee a better title than that possessed by the transferrer, and bills of lading are more correctly described as "transferable."

The negotiability of bills of lading in the strict sense is a debated question. In the recent case of the *Marlborough Hill* (1921), A.C., 444, Lord Phillimore observed: "If this document is a bill of lading it is a negotiable instrument," but this statement has been challenged in a learned review of the authorities by Mr. Raymond E. Negus in 37 *Law Quarterly Review*, 442 (October, 1921). Regarding the bill of lading as a document of title, see Bennett's "History of the Bill of Lading."

Goods.

The definition of goods in the Rules agrees with the provisions of the existing American, Australian, New Zealand, and Canadian legislation in excluding live animals. Cargo carried on deck is, however, not excluded by those Acts, though the Canadian statute as amended in 1911 excludes "lumber, deals, and other articles usually described as wood goods." Various statutory definitions of "goods" are quoted in Stroud's "Judicial Dictionary."

Ship.

Compare various statutory and other definitions collected in Stroud's "Judicial Dictionary."

Carriage of Goods.

This definition should be read with Article VI. Upon these provisions the whole question of the scope and application of the Rules arises. From the time when the goods are received on the ship's tackle to the time when they are unloaded from the ship's tackle the risks assumed by the carrier are those defined by the Rules. The carrier may have contracted to perform duties prior to loading and subsequent to unloading, but any liabilities in connection with those duties are to be ascertained otherwise than by reference to the Rules. Such liabilities may depend on terms expressly stated in the contract, or possibly on the custom of the port. Thus it was laid down in Catley *v.* Wintringham (1792), Peake, 202, that, by the custom of the River Thames, a shipmaster is bound to

guard goods laden into a lighter sent for them by the consignee until the loading of the lighter is complete. Any liability under that custom would be an obligation separate from and independent of liability under the Rules. Before goods are loaded and after they are unloaded the rights and obligations of the parties may be governed by contract or by local laws and customs. Only for the period of the voyage are they defined and standardised by the Rules.

In taking the time when the goods are received on the ship's tackle as the beginning of the period of "carriage of goods" and the time when the goods are unloaded from the ship's tackle as the end of that period, the Rules follow the terms of the Harter Act and Dominion legislation and the recommendations of the Imperial Shipping Committee, and also adopt the points of time which have been established in English law as marking the beginning and end of a sea carrier's duties.

The Rules, in fact, relate only to the period which was that covered by bills of lading before those documents had developed into contracts providing for a variety of additional services which may include collection and delivery before and after the voyage, and sometimes also transport overland and warehousing while in transit. A bill of lading, said Buller J. in the old case of Hyde *v.* Trent (1793), 5 T.R., 397, "is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." That is still the established

course of trade in some instances, as, for example, where a whole cargo is supplied by one shipper, or perhaps where one shipper supplies a substantial part of the cargo, but, where numerous miscellaneous small parcels of goods are shipped by a liner, the goods leave the merchant's possession long before they are received on the ship's tackle, and they are not delivered to the consignee himself when they are unloaded from the ship's tackle. If the carrier who undertakes the "carriage of goods" as defined in the Rules performs also additional services of the kind described, the terms on which these additional services are rendered must be looked for elsewhere than in the Rules.

On this point the Report of the Imperial Shipping Committee remarked:

> "In accordance with the modern methods of commerce, there are frequent cases where the shipowner, especially the liner-owner, performs services as forwarding agent or warehouseman before 'loading' or after 'delivery from the ship.' We think that the new legislation should not affect such services, which we understand are not covered by any of the existing Dominion Acts.
>
> "The Bill of Lading purports to be a receipt for the goods to be carried, as well as the contract for their carriage. Since the normal Bill of Lading opens with the word 'shipped,' the liability begins with the 'loading' and no question arises. In the case, however, of a 'received for shipment' Bill of Lading or other equivalent document, the proposed

uniform legislation should not affect services prior to 'loading.'

"Similarly, in regard to the close of the voyage, services by the shipowner when acting as warehouseman or forwarding agent subsequent to 'delivery from the ship' should also not be affected."

As to loading and unloading see further the notes to Article III., clause 2 (p. 57).

Article II.—Risks.

Subject to the provisions of Article V, under every contract of carriage of goods by sea the carrier, in regard to the handling, loading, stowage, carriage, custody, care and unloading of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities, hereinafter set forth.

Note on Article II.

It has already been pointed out that the Hague Rules, so far as they go, are a complete and self-contained code not assuming or depending on the law of any particular country to provide a general basis of carrier's liability. They define the responsibilities and liabilities to which the parties agree that the sea carrier shall be subject, and also the rights and immunities to which they agree he shall be entitled. These are all set out in the Rules

themselves, and, though it is convenient to refer to established general rules of law for the purpose of comparison, and in order to explain the effect of the Hague Rules, it must be borne in mind all the time that the Hague Rules themselves constitute (when they are incorporated in a bill of lading) the basis, and the complete basis, on which the parties contract with each other so far as sea carrier's risks are concerned.

It is convenient then to remark, as already indicated in the Introduction, that, unless otherwise agreed, a sea carrier has, by English law, the duties of a common carrier—that is, while goods are in the sea carrier's custody, he is responsible for every injury sustained by the goods occasioned by any means whatever, except the act of God or the King's enemies, or arising from the natural deterioration or inherent vice or defects or unfitness of the goods themselves. (Smith's "Leading Cases," 1915, vol. i., p. 233.) Further, these exceptions may not relieve the sea carrier from responsibility if he has failed to carry out certain undertakings which are, by English law, implied in the contract. These are (1) that the ship is seaworthy, (2) that it shall commence and carry out the voyage with reasonable dispatch, and (3) that it shall not deviate unnecessarily (Carver, p. 29; Scrutton, pp. 91 and 228). These rules of law are referred to again in the notes on Seaworthiness (p. 51) and Deviation (p. 82).

Article III.—Responsibilities and Liabilities.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to

(*a*) make the ship seaworthy;
(*b*) properly man, equip and supply the ship;
(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall on the demand of the shipper issue a bill of lading showing amongst other things

(*a*) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading starts, provided such marks are stamped or

otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as will remain legible until the end of the voyage ;

(*b*) the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper before the loading starts ;

(*c*) the apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to issue a bill of lading showing description, marks, number, quantity, or weight which he has reasonable ground for suspecting do not accurately represent the goods actually received.

4. Such a bill of lading issued in respect of goods other than goods carried in bulk and whole cargoes of timber shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with section 3 (*a*), (*b*) and (*c*). Upon any claim against the carrier in the case of goods carried in bulk or whole cargoes of timber the claimant shall be bound notwithstanding the bill of lading to prove the number, quantity or weight actually delivered to the carrier.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy of the description, marks, number, quantity and weight as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

6. Unless written notice of a claim for loss or damage and the general nature of such claim be given in writing to the carrier or his agent at the port of discharge before the removal of the goods, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading, and in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within 12 months after the delivery of the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that no "received for shipment" bill of lading or other document of title shall have been previously issued in respect of the goods.

In exchange for and upon surrender of a "received for shipment" bill of lading the shipper shall be

entitled when the goods have been loaded to receive a "shipped" bill of lading.

A "received for shipment" bill of lading which has subsequently been noted by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment shall for the purpose of these Rules be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect.

Notes on Article III.

Seaworthiness.

Under clause 1 of this Article the carrier is bound, before and at the commencement of the voyage, to exercise due diligence to make the ship seaworthy. The carrier's liability under this provision resembles (subject to some qualification indicated later) the liability to which the carrier is subject under existing legislation in the British Dominions, but contrasts with the absolute

warranty of seaworthiness implied, unless otherwise agreed, under English, Scottish and American law.

As to English and Scottish law, Lord Blackburn said, in Steel *v.* State Line (1877), 3 A.C., 86: "Where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." In other words, if no special stipulation is made, the shipowner undertakes, not merely that he will endeavour to make the ship fit, but absolutely that the ship shall be fit when she sails.

The American law is the same. The shipowner's obligation is not lessened by the Harter Act (McFadden *v.* Blue Star Line (1905), 1 K.B., 697, and American decisions quoted by Carver, p. 21).

As to Dominion legislation there is at present (as pointed out in the Report of the Imperial Shipping Committee) legislation in Canada, Australia, and New Zealand, but there is no corresponding legislation in the United Kingdom, India, South Africa, or Newfoundland.

"The chief difference" (the Report continues) "between the Australian Act and the rest of the legislation is the provision of Section 8 (1) to the effect that in every bill of lading there shall be an implied warranty of sea-

worthiness at the beginning of the voyage, while the other Acts are satisfied by the exercise on the part of the shipowner of due diligence to see that the ship is seaworthy in every respect, and is properly manned, equipped, and supplied.

"We should perhaps point out that the difference in effect between the exercise of due diligence and the absolute warranty of seaworthiness is that the former makes allowance for defects which could not have been discovered by the exercise of ordinary care, while the latter does not. We think that the former is the more reasonable requirement, since the principle that the shipowner should not be liable for what is not within his control is conceded in the matter of navigation risks.

"We think that the assimilation of the Australian law on this point with that of the rest of the Empire should be part of the uniformity to be effected."

The Hague Rules, it will be noticed, adopt the basis of uniformity favoured by the Imperial Shipping Committee, inasmuch as they do not require from the shipowner an absolute warranty of seaworthiness, but only that he shall, at the beginning of the voyage, exercise due diligence to make the ship seaworthy (Article III., clause 1), and the Rules free the shipowner from liability for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied (Article IV., clause 1).

The meaning of "seaworthiness" is that a vessel "must have that degree of fitness which an ordinary careful

and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it" (Channell J. in McFadden *v.* Blue Star Line (1905), 1 K.B., at p. 706 quoting Carver, p. 23). As interpreted by the English courts seaworthiness means fitness not only in the sense that the ship shall be "tight, staunch and strong," but also fitness for the carriage of the particular kind of cargo to be carried (Stanton *v.* Richardson (1874), L.R. 9, C.P. 390). As to refrigerating machinery see Cargo on *Maori King v.* Hughes (1895), 2 Q.B., 550, and Rowson *v.* Atlantic Transport Co. (1903), 2 K.B., 666. Fitness further means that the ship shall be in a proper condition to *receive* the particular cargo—Tattersall *v.* National S.S. Co. (1884), 12 Q.B.D., 297.

The Rules have been criticised on the ground that they require only the exercise of due diligence to *make* the ship seaworthy, while the Canadian Act obliges the carrier to make *and keep* the ship seaworthy. On this point it is material to note that the implied *absolute* warranty of seaworthiness under British law is fulfilled if the ship is seaworthy when she leaves her moorings (the *Rona* (1884), 5 Asp. M.C., 259), and the warranty does not include any undertaking that the ship will continue seaworthy. It is manifest, moreover, that if a ship is made seaworthy for the intended voyage (which is the meaning of seaworthy) a further requirement to "keep" her seaworthy does not add much to the obligation.

Responsibility for Goods.

The second clause of this Article is one of the most important in the code. It lays down that "The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried."

These words are similar to, but not identical with, those appearing in existing American and Dominions legislation. The form of expression is different. By existing legislation the insertion of any clause relieving the carrier from certain liabilities is prohibited. In the Hague Rules the liabilities themselves are positively stated. As to Dominions legislation the report of the Imperial Shipping Committee remarked that:

> "The governing terms of the existing Dominions legislation on this subject are to the effect that the owner, manager, agent, master, or charterer of any ship must not be relieved from liability for loss or damage arising from negligence, fault, or failure in the proper loading, stowage, custody, care, or delivery of goods received by him to be carried in or by the ship, nor must the obligations of the master, officers, agents, or servants of any ship to handle and stow goods carefully, and to care for, preserve and properly deliver them be lessened, weakened, or avoided."

As to this clause in the Hague Rules it has been objected (see pamphlet by Dr. A. E. Jackson) that the carrier's obligation is limited to "providing" for proper

and careful handling, etc., and suggested that, without lessening the liabilities imposed by the Rules, the carrier can insert a clause freeing himself from responsibility for the negligence of his servants.

It does not appear, however, how this can be so. Any clause lessening the carrier's liability otherwise than as provided in the Rules is of no effect. The Rules themselves (Article IV., clause 2) free the carrier from responsibility for the acts of his servants "in the navigation or in the management of the ship," but not in the handling of the cargo. The clause suggested would lessen the carrier's liability otherwise than as provided in the Rules and therefore be of no effect.

Moreover, the analogy of the general position under English law seems to be material here It was pointed out by Lord Macnaghten (in the *Xantho* (1887), 12 A.C., at p. 515) that, implied and involved in the contract evidenced by the common form of bill of lading, there is an engagement on the part of the carrier to use due care and skill in carrying the goods. Coupled with this is the fact that the tendency of the courts is to construe clauses exempting the carrier from liability for negligence of servants strongly against him unless expressed with the utmost clearness. The Hague Rules expressly throw upon the carrier the implied duty referred to by Lord Macnaghten, and expressly prohibit the insertion of additional clauses lessening the carrier's liability. In view of this the suggestion that an exception of negligence of carrier's servants can be added may be dismissed as insupportable. Indeed, from the reference to servants or agents in Article V., it would seem that a shipping

document subject to the Rules, and containing the exception suggested, could not be issued as a bill of lading at all.

With reference to this clause of the Rules in general it should be noted that the obligations imposed on the carrier are greater than under clauses hitherto common in bills of lading, the continued use of which would be inconsistent with the Rules, such, for example, as clauses negativing claims for loss or damage from bad stowage or pilferage.

The period covered by the Rules extends, it will be remembered, under the definition of "carriage of goods," from the receipt of the goods on the ship's tackle to their being unloaded. The present clause deals with various operations from loading to unloading, and, in this connection, some references to judgments in which these operations have been discussed will help to illustrate the legal view of them.

Loading and Unloading.—"The business of both parties," said Lord Selborne in Grant *v.* Coverdale (1884), 9 A.C., 470, "meets and concurs in that operation of loading." In that case the ship was, according to charter-party, to load "in the customary manner from the agents of the freighter" a cargo of iron at Cardiff. "When the charterer has tendered the cargo," proceeded the judge, "and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading . . . is the charterer's part only."

The ordinary operation of delivery by ship to con-

signee was analysed by Lord Esher in Petersen *v.* Freebody (1895), 2 Q.B., 294. "The shipowner," he observed, "acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay. Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery; that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the one in giving and the other in taking delivery; at another moment the joint act is finished."

"Apart from custom," said A. L. Smith L.J., in Brenda SS. Co. *v.* Green (1900), 1 Q.B., 518, "a ship has delivered her cargo when it is put over the rail, and, as has been frequently pointed out, that is a joint operation of shipowner and charterer." "The general law,"

added Romer L.J. in his judgment, "has been settled by a long series of cases which show that the plaintiffs' [the shipowners'] duty was complete when they delivered over the ship's rail." See also the Irish and Scottish cases of Langham *v.* Gallagher (1911), 12 Asp. M.C., 118, and Ballantyne *v.* Paton (1912), S.C., 246.

Liability in Canada before Loading.—As already remarked in discussing the definition of "carriage of goods" in the Rules, the rights and obligations of the parties before loading and after unloading may be governed by contract or by local laws and conditions. It may perhaps be noted here as an incidental point of local law that in Canada there is (in addition to the Water Carriage of Goods Act set out in Appendix II.) a provision in Section 963 of the Canada Shipping Act, Chapter 113 of the Revised Statutes, 1906, that: "Carriers by water shall be responsible not only for goods received on board their vessels, but also for goods delivered to them for conveyance by any such vessel, and they shall be bound to use due care and diligence in the safe-keeping and punctual conveyance of such goods, subject to the provisions hereinafter made." By subsequent sections the liability of carriers by water is subjected to the exception of loss or damage from certain causes beyond their control, and they are freed from liability for articles of great value unless declared. The effect of this legislation is not altogether clear. "Carriers by water" do not seem to be defined. Possibly the statutory provision applies only in the absence of conditions specifically agreed.

Stowage.—"By the maritime law," said Willes J. in

Blaikie *v.* Stembridge (1859), 6 C.B.N.S., 894, "in the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board the goods to be carried; which, ordinarily, are to be delivered to him alongside. For any damage to the goods occasioned by negligence in the performance of such duty, the owner is liable to the shipper. . . . This duty of the master has, however, in many cases been modified by custom or contract."

"The stowage of goods," said Cockburn C.J. in Sandeman *v.* Scurr (1866), L.R., 2 Q.B., 86, "in the absence of any special agreement, forms part of the obligation which the carrier takes upon himself. It is a duty to be discharged by the master and crew." In the same case it was further held that the employment of a stevedore made no difference as regarded the shipper, as he was no party to the employment, and had a right to look to the shipowner for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement.

It should be observed, however, that "though the master ought to be skilful in the matter of stowing ships, that is to be construed reasonably; and mere ignorance of the effect of stowing particular kinds of goods together will not be imputed to him as negligence, unless as a competent person he would reasonably be expected to know it" (Carver, p. 378).

Moreover, if goods are such that they are liable to cause injury to other goods, it is the duty of the shipper to notify that fact (see Article IV., clause 6, and Note on Dangerous Goods, p. 86).

Description and Shipment of Goods.

Clauses 3 to 5 of Article III. provide for the issue of a bill of lading showing

(*a*) The leading identification marks of the goods, and

(*b*) The number, or quantity or weight as furnished in writing by the shipper, and also

(*c*) The apparent order and condition of the goods.

The bill of lading is (except in certain special cases referred to later in this note) declared to be "prima facie evidence of the receipt by the carrier of the goods as therein described"—those are the important words—and the shipper is to be deemed to have guaranteed the accuracy of the description, marks, number, quantity, or weight furnished by him. If inaccuracy in these particulars gives rise to any claim, the shipper will be bound to indemnify the carrier.

In considering these provisions of the Rules it must be remembered that, under clause 8 of the same Article, any clause lessening the carrier's liability otherwise than as provided in the Rules is of no effect.

Bill of Lading Prima Facie Evidence of Shipment.—The ordinary rule of English law is that a bill of lading is prima facie evidence that the goods to which it refers were shipped. That is to say, the carrier is bound to deliver the full amount of goods signed for by the ship-master in a bill of lading unless he can prove that the whole or some part of it was in fact not shipped (Smith *v.* Bedouin (1896), A.C., 70). By French law a bill of

lading is conclusive evidence against the carrier of the receipt of the goods (Elder, Dempster *v.* Dunn (1909), 15 Com. Cas., 49).

By incorporating the Hague Rules in a bill of lading, therefore, the parties expressly agree that the contract between them shall be on the same basis as that of the English law. In practice, however, the rule of English law has frequently been made inapplicable to contracts by the insertion in bills of lading of words such as "quantity or weight unknown," preventing the documents from being prima facie evidence that the quantity or weight mentioned was shipped (see New Chinese Co. *v.* Ocean (1917), 2 K.B., 664). Any such qualifying clause will apparently not now be admissible if the particulars in question are in fact furnished in writing by the shipper and if the bill of lading incorporates the Hague Rules, or, if such a clause is inserted, it will be of no effect, because it would lessen the carrier's liability.

It will be noticed on a careful reading of the Rules that the description which the shipper is required to furnish is limited to the marks, number, quantity or weight, and does not necessarily include the nature and value of the goods. Nature and value may be declared, and questions may arise upon that, but they are discussed later under Article IV., clause 4. The present point is that a declaration of nature and value is not obligatory, and, in view of this, it would seem that, though the Rules prevent the carrier from inserting qualifying words as to quantity or weight, he will still be able to include "value and contents unknown" in a bill of lading. Apparently the clause "quality unknown" will also be

effective if inserted. The description is to include the apparent order and condition of the goods, but it has been held that "quality unknown" does not modify "shipped in good order and condition" (Compania *v.* Churchill (1906), 1 K.B., 237. See also Martineaus *v.* Royal Mail (1912), 17 Com. Cas., 176).

It should be noted in passing that by the Bills of Lading Act, 1855, Section 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board. Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims." Though the "person signing" includes a person for whom a clerk or servant signs, this expression does not include the shipowner when the shipmaster or broker signs, and accordingly a bill so signed is not conclusive against a shipowner (Grant *v.* Norway (1851), 10 C.B., 665; Thorman *v.* Burt (1886), 54 L.T. Rep., 349).

Provisions similar to those quoted from the Act of 1855 are contained in the Canada Bills of Lading Act (Chapter 118 of the Revised Statutes, 1906).

The provision in the Rules that no carrier shall be bound to issue a bill of lading showing particulars which he has reasonable ground for suspecting do not accurately represent the goods actually received is presumably merely a safeguard upon which the carrier may fall back if necessary, and would be acted on only in exceptional cases. If acted on, and the issue of a bill of lading declined, there would be no completed transaction at all, and it does not seem necessary to comment further on this provision.

Bulk Cargoes: Bill not Prima Facie Evidence.—The special instances above referred to in which the bill of lading is (under the Rules) not prima facie evidence of receipt of the goods as described are goods carried in bulk and whole cargoes of timber. In some trades (notably coal) it is not customary for the carrier to accept responsibility as to quantity or weight, and the provision in the Rules is adapted to that custom. In some other trades, however, where bulk cargoes are carried (notably timber and corn), it is usual to insert a clause (known as the conclusive evidence clause) to the effect that the bill of lading shall be conclusive evidence against the carrier of the quantity of cargo received (see Lishmann *v.* Christie (1887), 19 Q.B.D., 333). It might appear, at first sight, as if the Rules introduce something directly contrary to the practice of this trade, but it must be remembered that the code of conditions contained in the Rules, while appropriate to the majority of cases, may be made, in special trades, merely a nucleus to which special clauses may be added as required, so long as they do not conflict. In this connection it should

accordingly be observed that, while clause 8 of the present Article makes non-effective any clause lessening the carrier's liability, a later clause gives the carrier liberty to surrender any of his rights or immunities (see Article IV., clause 7). The insertion of the conclusive evidence clause is a surrender by the carrier of a right or immunity—it does not lessen, but increases his liability—and accordingly there seems to be nothing which would prevent the continued use of this special clause, which is usual in the timber and corn trades, along with the Rules, where the bill of lading relates to the commodities dealt with in those special trades.

Comparison with Existing Legislation.—The provisions of the Rules as to description and shipment of goods correspond closely with those in the Harter Act and in the Canadian Act (see Harter Act, Section 4, and Canadian Act, Section 9, with exclusion of wood goods by section 2 as amended, in Appendix II.).

Notice of Claim for Damage.

Clause 6 of this Article provides (1) that unless written notice of a claim for loss or damage is given before removal of the goods, such removal shall be prima facie evidence of due delivery, and further (2) that, in any event, liability for loss or damage shall cease unless suit is brought within twelve months after delivery.

On the first point, as indicated in the Introduction, the clause deals not with rights but with evidence. It lays down a rule of evidence as to proof of claim, and does not in any way affect the question of what claims

can be made. If a claim for loss or damage arises written notice indicating the general nature of the claim is to be given before removal of the goods. Removal without such notice will be prima facie evidence of delivery of the goods as described in the bill of lading.

This puts the person who takes delivery in very much the same position as that in which he would be under the general principles of law if there had been no such provision in the Hague Rules. If he were to accept delivery without raising any question of loss or damage, and afterwards made a claim, he would, on general principles, be required to show that the loss or damage did not occur after he took delivery. He would not succeed in his claim unless he disposed of the prima facie presumption that the delivery he had accepted without question was a delivery of the goods in the condition contracted for.

If the fact was that the damage could not be discovered till the goods had been unpacked, evidence of that fact and evidence that no damage had been done since delivery would counter the prima facie presumption of due delivery as much under the Hague Rules as it would if general principles applied.

Some criticism of this clause has been based on the assumption that "removal" is the same point of time as unloading from the ship's tackle, but clearly this is not necessarily so. The Hague Rules, as has been pointed out several times, deal primarily with a period which ends when the goods leave the ship's tackle, but by this particular clause it is expressly laid down that a presumption of due delivery arises only in the absence of

notice "at the port of discharge before the removal of the goods." If, under some clause in the bill of lading, the carrier acts as wharfinger or warehouseman, "removal" can hardly be said to take place until the carrier, in that other capacity, finally delivers the goods. When delivery is taken the receipt can, of course, be given for goods "not examined," or a precautionary notice of claim can be embodied in the receipt if thought desirable.

The circumstances in which the greatest practical difficulty may arise will perhaps be where goods leave the carrier's custody by discharge from ship to lighter, but, even here, the position of the person who takes delivery by the lighterman as his agent is no worse under the Rules than under the general principles of law. In this connection it is worthy of note that the "London Lighterage Clause" has recently been modified. Instead of accepting goods for conveyance entirely at owner's risk, the lighterman now undertakes responsibility for loss arising from pilferage and theft of goods on board a lighter while in course of transit, such loss or damage being limited to £20 per package and not exceeding £50 per ton. Under these altered lighterage conditions master lightermen will, it may be assumed, feel bound to exercise closer supervision over those they employ.

In considering how the adoption of this clause of the Hague Rules as the basis of contract affects the relative position of carrier and merchant, the comparison must of course be made with clauses previously in use. For this purpose the clause which formed part of the bill of lading in question in Moore *v.* Harris (1876), 1 A.C., 318, may

serve as an illustration. In that case packages of tea were carried from London under a bill of lading and were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal" . . . "unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to the consignees or their assigns." The instrument contained a condition that "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." No notice of damage was given until some time after delivery. It was held that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages conducted with reasonable care and skill at the place of removal have been discovered. The Privy Council, it may be noted in passing, were of opinion that the "place of removal" was not Montreal, but Toronto, thus confirming the view above expressed as to the meaning of "removal." The merchants failed to establish a claim for damage. The condition in the bill of lading did not merely throw the burden of proof on them in the absence of notice before removal, but in that event absolutely barred their claim (see also Chartered Bank of India *v.* British India S.N. Co. (1909), A.C., 369).

The second provision of the clause of the Rules under discussion, that the carrier's liability shall cease at the end of a year unless an action is commenced within that time, should be compared, not with the rule of English law

barring claims after six years, but with clauses hitherto appearing in bills of lading whereby claims are not recoverable at all unless made before removal of the goods (as in the case above quoted, and in American Line form given in Leggett's "Bills of Lading," p. xlviii) or within a very limited time, such as a month of steamer's arrival (see Orient Line form given by Leggett, p. xlii; see also American decisions cited by Carver, p. 161).

"Received for Shipment" Bills of Lading.

The Hague Rules provide that after goods have been loaded the shipper may require a "shipped" bill of lading, that is, a bill of lading in the ordinary form. The Rules do not deal with "received for shipment" bills of lading except by providing that, after goods have been loaded, a document of that kind may be exchanged for a "shipped" bill of lading, or may be converted into a "shipped" bill by being noted with the name of the ship and the date of shipment. The result of the discussion at the Hague of which the Rules are the outcome was that no provision affecting the legal relationship between parties to "received for shipment" bills of lading was inserted in the Rules themselves. Debate served to call attention to business difficulties arising in connection with this class of shipping document, but these difficulties, it was felt, are matters calling for separate and distinct treatment, and, accordingly, all that was done at the Hague was to refer, in one of the resolutions adopted, to the desirability of co-operation among the interests concerned with a view to some solution being arrived at.

It is recognised that "received for shipment" bills of

lading are in many cases a necessity of commerce. Where, for example, a liner takes cargo at several ports, staying perhaps only a few hours, it may be impossible to issue a "shipped" bill in time to allow of its being lodged by the recipient with the bank, examined there, and sent forward by the same ship as the goods. Moreover, where, in the East, goods are loaded from river craft at a distance from the business centre, the difficulty again arises that a "shipped" bill cannot be mailed by the same steamer unless the steamer's departure is delayed. In actual fact "for shipment" bills are in general use not only in connection with cotton shipments, but in other branches of the trade from America, where the special difficulties recently discussed do not ordinarily arise. They are in use also in the Australian trade, but the action of banks in declining to treat these documents as bills of lading has resulted, it was stated at the Hague, in "shipped" bills of lading being issued in Australia to enable shippers to make their financial arrangements, although in fact the goods have not been shipped. This is clearly a most undesirable practice, but acceptance of the alternative form of document may involve banks in liabilities of a serious kind. In view of a recent decision banks now hesitate or decline to accept the "for shipment" form when instructed to finance a c.i.f. contract, except, of course, in trades where that form has become part of the ordinary routine, or is in accordance with the banker's instructions in the particular case.

The decision referred to is one of several bearing on the question. No group of recent cases has excited greater interest in business circles than have these

decisions. The first case was that of the *Marlborough Hill*, judgment in which was given at the end of 1920. Lord Phillimore, in delivering the judgment of the Privy (1921), A.C., 444, indicated the opinion that the "for shipment" form of document is a bill of lading for all purposes, though the court had not actually to decide that point. In May, 1921, the case of Weis *v.* Produce Brokers Co. (7 Lloyd's List Law Reports, 211) was decided by the Court of Appeal, and at the end of June the case of United Baltic Corporation *v.* Burgett (8 Lloyd's List Law Reports, 190), arising out of a shipment from Shanghai by the same vessel, the *Polyphemus*, came before the same court, and it was held that the bill of lading usual in that trade—"shipped or delivered for shipment"—was a compliance with a c.i.f. contract. Three days later Mr. Justice McCardie in Diamond Alkali Export Corporation *v.* Bourgeois (1921), 3 K.B., 443, held that a "received for shipment" bill of lading was not a fulfilment of the seller's obligation under the c.i.f. contract in the particular case before him. Attention does not seem to have been called to the decision of the higher court just delivered, with which this judgment appears to conflict, and, as a notice of appeal against Mr. Justice McCardie's judgment was withdrawn, the legal question remains open. The judicial expression of view adverse to the sufficiency of the "for shipment" form influenced the attitude of bankers in such a way as to produce the difficult business position above referred to.

The general trend of opinion appears to be that, as the "for shipment" form is a necessity in some circumstances, terms must be adjusted so that its use may be

continued under suitable conditions. In view of the commercial importance of the matter, more detailed reference may be made to the two principal cases.

The "Marlborough Hill" Case.—In the case of the *Marlborough Hill* (1921), 1 A.C., 444 (5 Lloyd's List Law Reports, 362), the document which was in question acknowledged the receipt of goods for shipment on board a named ship or on some other ship for carriage by sea and delivery to the shipper's order.

Lord Phillimore, in delivering the judgment of the Privy Council, said. "It is a matter of commercial notoriety, and their Lordships have been furnished with several instances of it, that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form 'received for shipment' instead of 'shipped on board,' and further with the alternative contract to carry or procure some other other vessel (possibly with some limitations as to the choice of the other vessel) to carry, instead of the original ship. It is contended, however, that such shipping instruments, whatever they may be called in commerce or by men of business, are nevertheless not bills of lading, within the Bills of Lading Act, 1855, and it is said therefore not bills of lading within the meaning of the Admiralty Court Act, 1861.

"Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and

his acknowledging that the goods have been actually put over the ship's rail. The two forms of a bill of lading may well stand, as their Lordship's understand that they stand, together. The older is still the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas 'received for shipment' is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.

"Then, as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment."

Mr. Justice McCardie's Decision.—In the case heard by Mr. Justice McCardie the question was whether tender of a "received for shipment" bill of lading was sufficient under a c.i.f. contract of sale, shipment being from America to Sweden, and terms of payment being cash against documents under confirmed banker's credit at London. He decided that it was not sufficient, after reviewing the authorities, including the *Marlborough Hill* case, but, as already mentioned, the decision of the Court

of Appeal which had been given a few days before did not come under notice.

Mr. Justice McCardie, in the course of his judgment, said: "I wish to point out first that the actual decision in the *Marlborough Hill* case was merely that the bill of lading there in question (which closely resembles the one now before me) fell within Section 6 of the Admiralty Court Act, 1861. It may be that the phrase 'bill of lading' in that section permits of a broad interpretation. I point out next that there is no express statement in the *Marlborough Hill* case that the document there in question actually fell within the Bills of Lading Act, 1855."

Under the last-mentioned Act, it may be explained, the indorsee of a bill of lading has the rights of the original shipper, and, by the Act of 1861, also referred to, the indorsement of a bill of lading may give to the indorsee a right of action in Admiralty against the carrying ship.

While diffident in discussing the *Marlborough Hill* decision, Mr. Justice McCardie pointed out that legally it was not binding on him, and expressed the view that there was a great difference, both from a legal and business point of view, between receiving for shipment and receiving on board ship. Moreover, he considered that substitution and the right of transhipment are distinct things, and rest on different principles. The passage in which these points were discussed by the Privy Council would, he thought, have no application at all to a c.i.f. contract which provides for a definite date of shipment. He held, accordingly, that the *Marlborough Hill* case did not apply to a c.i.f. contract such as that before him, and

that, though the document before him was a "shipping document" within the American Harter Act, it was not a bill of lading within the c.i.f. contract between the parties in the case he had to decide.

There is, therefore, some conflict of judicial opinion. It may well be, as Mr. Justice McCardie observed, that his decision that the buyer was entitled to reject the documents on the ground that no proper bill of lading was tendered by the sellers in conformity with the c.i.f. contract, will be disturbing to business men. He considered, however, that the phrase "bill of lading" as used with respect to a c.i.f. contract, means a bill of lading in the sense established by a long line of legal decisions, and that, unless this meaning be given, the matter is thrown into confusion. The judge added, however, that possibly legislation is needed to enlarge the operation of the Act of 1855, though he thought that the difficulties indicated in his judgment could be met by the insertion of appropriate clauses in c.i.f. contracts.

This final suggestion is very much the same as that made by Mr. W. W. Paine, one of the representatives of the British Bankers' Association at the Hague. "Received for shipment" bills of lading are well established in the American trade under conditions which meet some of the bankers' difficulties. In the Eastern trade they have been issued in some instances by shipowners under pressure from consignors. If, however (Mr. Paine pointed out), consignors and consignees agree in giving bankers instructions to recognise these documents, and if difficulties like those arising in connection with date of shipment can be provided for, satisfactory arrangements which will meet trading requirements can be made.

Article IV.—Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(*b*) fire;

(*c*) perils, dangers and accidents of the sea or other navigable waters;

(*d*) act of God;

(*e*) act of war;

(*f*) act of public enemies;

(*g*) arrest or restraint of princes, rulers or people, or seizure under legal process;

(*h*) quarantine restrictions;

(*i*) act or omission of the shipper or owner of the goods, his agent or representative;

(*j*) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

(*k*) riots and civil commotions;

(*l*) saving or attempting to save life or property at sea;

(*m*) inherent defect, quality or vice of the goods;

(*n*) insufficiency of packing;

(*o*) insufficiency or inadequacy of marks;

(*p*) latent defects not discoverable by due diligence;

(*q*) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents, servants or employees of the carrier.

3. Any deviation in saving or attempting to save life or property at sea or any deviation authorised by the contract of carriage shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

4. Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods in an amount beyond £100 per package or unit, or the equivalent of that sum

in other currency, unless the nature and value of such goods have been declared by the shipper before the goods are shipped and have been inserted in the bill of lading.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

The declaration by the shipper as to the nature and value of any goods declared shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

5. Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been wilfully misstated by the shipper.

6. Goods of an inflammable or explosive nature or of a dangerous nature, unless the nature and character thereof have been declared in writing by the shipper to the carrier before shipment and the carrier, master or agent of the carrier has consented to their shipment, may at any time before delivery be destroyed or rendered innocuous by the carrier without compensation to the shipper, and the shipper of such

goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such consent shall become a danger to the ship or cargo they may in like manner be destroyed or rendered innocuous by the carrier without compensation to the shipper.

7. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities under this Article, provided such surrender shall be embodied in the bill of lading issued to the shipper.

Notes on Article IV.

Excepted Perils.

Under the second clause of this Article neither the carrier nor the ship is responsible for loss or damage arising or resulting from certain perils enumerated under a series of alphabetical headings.

These excepted perils are substantially those hitherto commonly excepted in bills of lading, and the headings also correspond in the main with the provisions contained in Dominions legislation. As remarked in the Introduction, however, many bills of lading contain, besides the common exceptions, many additional clauses varying with each trade and each shipowner. Under the Hague Rules no additional limitations of the carrier's liability will be admissible, and the fixed list alone will apply.

A bill of lading containing words corresponding almost exactly with those in heading (*a*) in this clause came before the Court in The *Ferro* (1893), P., 38. A merchant had shipped oranges under a bill of lading excepting (*inter alia*) "damage from any act, neglect, or default of the pilot, master or mariners in the navigation or management of the ship." The oranges were damaged by the negligent stowage of the stevedore, and it was held that the shipowners were not protected by the exception in the bill of lading, as the stevedore was not included in the list of persons whose acts, etc., were excepted, and further that the words "management of the ship" did not include improper stowage.

The term "management" occurs also in the Harter and Canadian Acts, and its meaning has been considered by the English and American courts in a number of cases which may be found collected in Scrutton, p. 264, and Carver, p. 154.

As to heading (*b*), fire, compare the Merchant Shipping Act, 1894, Section 502, which exempts a shipowner from liability for loss of or damage to goods by fire on board if the loss happens without his actual fault or privity, and the similar provision in section 4282 of the Revised Statutes of the United States. The exception of fire appears in the Canadian Water Carriage of Goods Act.

(*c*), Perils of the sea, etc., is a common form exception, and similar words appear in the Harter and Canadian Acts (see Scrutton, p. 246). (*d*), Act of God, and (*f*), act of public enemies, appear in the Harter and Canadian Acts. (*e*), Act of war, is similar. (*g*), Restraint of princes, etc., is a common form exception, and the addi-

tion of "seizure under legal process" agrees with the Harter and Canadian Acts. (*h*), Quarantine restrictions. This exception, like all those in this list, relates to a matter beyond the control of the carrier. (*i*), Act or omission of the shipper. This is clearly a good ground of exception, and headings (*m*), (*n*), and (*o*) are of the same character. All these except the last are to be found in the Harter and Canadian Acts. (*j*), Strikes, etc. This has become a very usual exception. The next heading is similar. (*l*), Saving or attempting to save life or property at sea. These words appear in the Harter and Canadian Acts. "Deviation" in rendering such service follows there, but in the Hague Rules is transferred to another clause. See separate note on Deviation below. (*p*), "Latent defects" is apparently an expansion of "inherent defects" already excepted. (*q*), The general clause at the end of the list, referring to "any other cause," is limited by its express terms to matters beyond the control of the carrier.

Deviation.

The third clause of Article IV. allows (and frees the carrier from liability for loss or damage resulting from) deviation (*a*) to save life, (*b*) or property, or (*c*) if authorised by the contract of carriage.

Dealing first with (*a*) and (*b*), it may be recalled that it was held in Scaramanga *v.* Stamp (1880), 5 C.P.D., 295, that a deviation to save life was justifiable, but not a deviation for the mere purpose of saving property. Consequently the latter has commonly been made permissible by clauses in bills of lading. The Harter and

Canadian Arts make the same provision, so the Hague Rules merely follow precedent.

As to the third point, some explanation may be made. It has already been pointed out (p. 47) that by English law certain undertakings are implied in the contract of sea carriage, and that one of these is an undertaking that the ship shall not deviate unnecessarily. "Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify . . . the owner of the goods carried in repudiating the contract to carry" (Scrutton, p. 91). To obviate the possibility that a deviation might have the effect of displacing the contract of the bill of lading, and thus depriving them of the benefit of the exemptions from liability given by the various clauses of the document, shipowners have been in the habit of inserting in bills of lading further clauses as to deviation giving great liberty of action in that matter. (As to the legal consequences of deviation under English law see Morrison *v.* Shaw Savill (1916), 2 K.B., 283.) The clauses inserted have varied with the circumstances of the trade. It is not practicable to standardise provisions as to deviation and lay down uniform conditions to apply to all circumstances, and the Hague Rules allow of the insertion of any conditions as to deviation in a separate clause. They do not standardise conditions in this respect except as to (*a*) and (*b*) above.

Maximum and Minimum Liability.

Reference was made in the Introduction to the terms of clause 4 of Article IV. of the Rules providing that

there shall be no liability beyond £100 per package or unit unless the nature and value of the goods have been declared and inserted in the bill of lading, and that a higher but not a lower figure may be substituted by agreement, the last-mentioned provision (making £100 a minimum as well as a maximum) being designed to prevent evasion of liability by agreed under-valuation of goods.

This point was referred to in the Report of the Imperial Shipping Committee, which quoted Section 8 of the Canadian Water Carriage of Goods Act, 1910, as follows:

> "The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a higher value is stated in the bill of lading or other shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding or conclusive on the ship, her owner, charterer, master or agent."

The Report then observed:

"It is noticeable that the limit of one hundred dollars imposed by the Act is low compared with the limit voluntarily imposed by the shipowners in other trades. The Act, apparently, leaves it open to the shipowner to charge

a higher freight for packages of which the declared value is over one hundred dollars.

"Neither of the other similar Dominion Acts nor the Harter Act contains any provision of this kind, and although the Harter Act purports to render it illegal for shipowners to contract out of their liability for loss of, or damage to, goods, nevertheless, the United States courts have held that it was competent for a carrier of goods to agree with the shipper upon the valuation of the property carried, so that the carrier assumes liability only to the extent of the agreed valuation. The view has been expressed to us that, in effect, shipowners could evade their liability under any of the existing legislation except, perhaps, the Canadian Act, by 'agreeing' an extremely low value for goods with the shipper."

This is the loophole mentioned in the Introduction, which the Hague Rules close (see p. 29).

The matter becomes clear if the terms of the Harter Act are considered in relation to cases decided upon it.

The Harter Act provides by Section I., that it shall not be lawful to insert in any bill of lading or shipping document any clause whereby the shipowner shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise, and that any clauses of such import shall be null and void and of no effect.

Notwithstanding these provisions it has been held by the American courts that it is competent for carriers to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier

assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier (Calderon *v.* Atlas Steamship Co., 170 U.S., 272). In the English courts the same view was taken in Morris *v.* Oceanic (1900), 16 T.L.R., 533, and Tuck *v.* America Levant Line (unreported, but cited in (1917), 2 K.B., 425).

It has been held, however, that a clause to the effect that the shipowner would not be accountable for any one package which was of a value of more than £100 unless the value thereof was declared and extra freight agreed upon and paid is inconsistent with the Harter Act, and, if the bill of lading is subject to that Act, must be treated as null and void (Hordern *v.* Commonwealth and Dominion Line (1917), 2 K.B., 420).

The difference between saying that the ship shall not be liable beyond so much per package, and saying that each package is to be taken as of a particular value makes all the difference between conflicting with the Harter Act and not conflicting.

The Harter Act, inasmuch as it thus allows unrestricted under-valuation, contains a loophole which enables the shipowner to escape liability. The Canadian Act proceeds by the alternative method of laying down that the shipowner (who is not allowed to insert any clause relieving himself from liability) shall not be liable beyond so much per package, but the figure is one hundred dollars only, against one hundred pounds specified by the Hague Rules, which expressly provide that a higher but not a lower limit may be substituted by agreement.

Dangerous Goods.

By clause 6 of Article IV. goods of an inflammable or explosive nature or of a dangerous nature (unless their nature and character have been declared in writing and the carrier has consented to their shipment) may be destroyed without compensation to the shipper, who is to be liable in damages.

These provisions are similar to the English law on the point. By common law there is an implied undertaking by a shipper not to ship dangerous goods without notice, and, under statute, certain specified goods of a dangerous nature may, if shipped without being marked or notified, be thrown overboard.

The Rules speak of "goods of an inflammable or explosive nature or of a dangerous nature" without further definition, and presumably the words are to be taken in their ordinary meaning. There have, in the past, been a number of cases decided on dangerous goods. See, for example, Brass *v.* Maitland (1856), 6 E. and B., 470, where bleaching powder containing chloride of lime was in question. In Mitchel *v.* Steel (1916), 2 K.B., 610, the shipper's obligation not to ship without notice dangerous goods which might cause the destruction of the ship was held to extend by analogy to the shipment of goods which might involve the ship in danger of forfeiture or delay—*e.g.*, the shipment during war of a cargo of rice to a port where the discharge of rice had been prohibited by the authorities.

For the purpose of the statute above referred to (the

Merchant Shipping Act, 1894), "dangerous goods" is expressly defined as meaning "aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, and any other goods which are of a dangerous nature." The Explosives Act, 1875, in its turn, defines "explosive" as meaning gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires, and every other substance, whether similar to those above mentioned or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect, and includes fog-signals, fireworks, fuzes, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of an explosive as above defined.

The provisions of the Merchant Shipping Act, 1894, as to "dangerous goods" may be summarised as follows. By Section 446 a person shall not send by any ship any dangerous goods without distinctly marking their nature on the outside of the package, and giving written notice of the nature of those goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped. Penalty for breach, £100, or on an agent unaware of dangerous nature of goods, £10.

It was held by the King's Bench Division (Ireland) in L.N.W.R. *v.* Farey (1920), 5 Lloyd's List Law Reports, 90, that a motor-car containing petrol in its tank was

a "package" containing dangerous goods within this section.

By following sections of the Act knowingly sending dangerous goods under a false description is subject to a penalty of £500.

The master or owner of a vessel may refuse to take on board any package or parcel which he suspects to contain dangerous goods and may require it to be opened to ascertain the fact.

Where any goods which, in the judgment of the master or owner of the vessel are dangerous, have been sent without being marked or notified as above, the master or owner may cause those goods to be thrown overboard and shall not be subject to any liability for so doing. Moreover, any court having Admiralty jurisdiction may declare the goods forfeited and direct how they shall be disposed of.

The American law resembles the English. A carrier cannot be required to carry articles dangerous in themselves, and, by an Act of Congress of 4th March, 1909, marking and notice of dangerous goods are required under penalty.

Article V.—Special Conditions.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms

as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, or the care or diligence of his servants or agents in regard to the handling, loading, stowing, custody, care and unloading of the goods carried by sea, provided that in this case no bill of lading shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Note on Article V.

Exceptional Risks.

It will of course be open to any parties to use a bill of lading containing any terms whatever, and to disregard the Hague Rules entirely. The "contracting-out" provisions of Article V. are merely to the effect that, if special terms as to carrier's liability are agreed, and a shipping document incorporating the Rules is nevertheless issued, it may not be a bill of lading, but must be a receipt marked as a non-negotiable document.

In other words, the liberty granted by Article V. of the Rules to agree to special conditions in regard to any particular goods is safeguarded by the requirement that any special agreement lessening the carrier's liability as fixed by the Rules shall be embodied in a receipt, which

shall be a non-negotiable instrument and shall be marked as such. If made subject to the Rules such an agreement cannot be in the form of a negotiable bill of lading.

The importance of some provision being made for exceptional cases, in which goods should be allowed to be carried by shipowners at owner's risk, was emphasised in the Report of the Imperial Shipping Committee, and a method of making provision was outlined in their Report, but the Hague Rules deal with this point much more simply, and, it would seem, effectively, than would be the case if the plan proposed in the Committee's Report was adopted.

"It was suggested to us in evidence" (said the Imperial Shipping Committee) "that had refrigerated carriage not been well established in the trades affected at the dates of the passing of the Harter Act and of the similar Dominion Acts, their provisions might have prevented the initiation or development of that method of sea transport, as the shipowner would have refused to bear the unknown risk. It was urged that in any new legislation provision should be made for the transfer of liability to the trader in respect of similar developments in the future. We were impressed by this argument and shall refer to it again later."

In passing, it may be observed that the fact that the Committee contemplated legislation, whereas the Rules represent international agreement, is immaterial in connection with the question how provision for exceptional risks could best be made.

Later in their Report the Committee observed: "We believe that such exceptional cases are likely to be very

few, but we think it important that the new legislation should contain provisions for defining what articles, voyages, or methods of carriage ought to be excepted from its operation on the ground that the risks attached to the carriage or voyage are so new or uncertain that it is inexpedient that the Act should apply; and further that, inasmuch as such risks will in most cases be likely to become ordinary risks as the trade in question develops, there should be power to remove such exceptions."

To secure elasticity as to new and exceptional articles, voyages, and methods of carriage, and as to the curtailment of liability in exceptional circumstances, the Committee suggested that provision should be made for references to an Imperial Investigation Board.

That suggestion, however, is open to the criticism that to give effect to it would involve increase of officialism, and, moreover, would be to set up a method whereby decisions would rest with persons other than those actually concerned. The Committee's proposals lack the automatic quality of the provision in the Hague Rules, which leaves the parties themselves free to settle their own affairs, and at the same time ensures that the shipping documents, if containing special conditions lessening the carrier's liability, shall (1) not be in the form of bills of lading at all, or (2) if in that form shall be special bills not incorporating the Rules, which are intended to form part of all ordinary bills of lading.